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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Hi-Health Supermart Corp.,

Plaintiff/Counterclaim
Defendant,

v.

i-Health, Inc.,

Defendant/
Counterclaimant.

Case No. 2:12-cv-02615-GMS

**DEFENDANT I-HEALTH, INC.'S
ANSWER AND COUNTERCLAIMS**

(Assigned to the Honorable G. Murray
Snow)

ANSWER

Defendant/Counterclaimant i-Health, Inc. ("Defendant"), by and through undersigned counsel, in and for its Answer to Plaintiff/Counterclaim Defendant Hi-Health Supermart Corp.'s ("Plaintiff") Complaint (Doc. No. 1), state and allege as follows:

1. Defendant does not have sufficient information to either admit or deny these allegations and, therefore, denies same and leaves Plaintiff to its proof.
2. Defendant does not have sufficient information to either admit or deny these allegations and, therefore, denies same and leaves Plaintiff to its proof.
3. Upon information and belief, admitted.
4. Admitted.

1 5. Defendant does not have sufficient information to either admit or deny
2 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

3 6. Defendant does not have sufficient information to either admit or deny
4 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

5 7. Defendant does not have sufficient information to either admit or deny
6 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

7 8. Defendant does not have sufficient information to either admit or deny
8 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

9 9. Defendant does not have sufficient information to either admit or deny
10 these allegations and, therefore, denies same and leaves Plaintiff to its proof, with the
11 exceptions that U.S. Trademark Registration No. 1,197,635 should be cancelled
12 pursuant to 15 U.S.C. § 1119 due to abandonment of the registered trademark and due
13 to fraudulent maintenance of the registration.

14 10. Defendant does not have sufficient information to either admit or deny
15 these allegations and, therefore, denies same and leaves Plaintiff to its proof, with the
16 exceptions that U.S. Trademark Registration No. 1,197,635 should be cancelled
17 pursuant to 15 U.S.C. § 1119 due to abandonment of the registered trademark and due
18 to fraudulent maintenance of the registration.

19 11. Defendant does not have sufficient information to either admit or deny
20 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

21 12. Defendant does not have sufficient information to either admit or deny
22 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

23 13. Defendant does not have sufficient information to either admit or deny
24 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

25 14. Defendant does not have sufficient information to either admit or deny
26 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

27 15. Defendant does not have sufficient information to either admit or deny
28 these allegations and, therefore, denies same and leaves Plaintiff to its proof, with the

1 exception that “hi-health” is a business name and is not a trademark on the bottle;
2 instead, it appears that “Ocucel®” and “Premier Formula for Ocular Nutrition™” are
3 allegedly trademarks used on the bottle.

4 16. Defendant does not have sufficient information to either admit or deny
5 these allegations and, therefore, denies same and leaves Plaintiff to its proof, with the
6 exception that “hi-health” is a business name and is not a trademark on the bottle;
7 instead, “ULTRA PLAN®” and a partially shown “mate-plus®” are allegedly
8 trademarks used on the bottle.

9 17. Defendant does not have sufficient information to either admit or deny
10 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

11 18. Defendant does not have sufficient information to either admit or deny
12 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

13 19. Denied.

14 20. Denied.

15 21. Admitted, with the exception that the website is www.i-healthinc.com.

16 22. Admitted, with the exception that the website is www.i-healthinc.com.

17 23. Denied that there is any such “legend.” Instead, in very small print on the
18 back of the product packaging box is the business name “i-Health, Inc.”

19 24. Denied that there is any such “legend.” Instead, in very small print on the
20 back of the product packaging box is the business name “i-Health, Inc.” Admitted with
21 respect to the other statements.

22 25. Defendant does not have sufficient information to either admit or deny
23 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

24 26. Admitted.

25 27. Denied.

26 28. Denied.

27 29. Denied.

28 30. Denied.

1 31. Defendant does not have sufficient information to either admit or deny
2 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

3 32. Denied.

4 33. Denied.

5 34. Denied.

6 35. Denied.

7 36. Denied.

8 37. Denied.

9 38. Defendant does not have sufficient information to either admit or deny
10 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

11 39. Denied.

12 40. Defendant does not have sufficient information to either admit or deny
13 these allegations and, therefore, denies same and leaves Plaintiff to its proof.

14 41. Denied.

15 42. Denied.

16 43. Denied.

17 44. Denied.

18 45. Denied.

19 46. Denied.

20 **GENERAL DENIAL**

21 47. Defendant denies each and every allegation of the Complaint that is not
22 specifically and expressly admitted herein.

23 **AFFIRMATIVE DEFENSES**

24 48. Plaintiff's Complaint is defective and fails to state a claim against
25 Defendant upon which relief can be granted.

26 49. Upon information and belief, Plaintiff's alleged trademarks are non-
27 existent or are limited in scope in view of Plaintiff's filings and assertions during
28 prosecution of its two U.S. applications for the Hi-Health and sun design trademarks of

1 U.S. Registration Nos. 1,197,635 and 1,212,787 and post registration filings for the
2 asserted registered trademarks and any other alleged trademarks.

3 50. Upon information and belief, Plaintiff's alleged trademarks are non-
4 existent or are limited in scope because Plaintiff abandoned or has not used for an
5 extended period of time its asserted registered trademarks in the U.S. with the
6 goods/services identified in the registrations.

7 51. Upon information and belief, Plaintiff's alleged trademarks are limited in
8 scope in view of the plethora of third party HEALTH trademarks, applications,
9 registrations, and activities. There are over one thousand (1000) live US applications
10 and registrations in Class 5 (for healthy products) that contain the HEALTH term.

11 52. Plaintiff's alleged trademarks have a different appearance, pronunciation,
12 connotation, and commercial impression than any i-Health term.

13 53. Upon information and belief, there is no likelihood of confusion with
14 respect to any i-Health term for Class 5 goods in view of, inter alia, the limited scope of
15 Plaintiff's alleged trademarks, the plethora of third party HEALTH trademarks and
16 terms, the differences in the parties' trademarks and terms, the different goods of the
17 parties, the different manner of use of the parties' trademarks and terms, and the
18 sophistication of the different targeted customers of the parties.

19 54. Upon information and belief, Defendant's targeted customers are
20 sophisticated people who are not likely to be confused between any i-Health term and
21 Plaintiff's alleged trademarks, and Plaintiff's targeted customers are sophisticated
22 people who are not likely to be confused.

23 55. Upon information and belief, Defendant's goods are not impulsively
24 purchased by customers; instead, Defendant's goods are purchased by knowledgeable
25 people after a reasoned study. As a result, a likelihood of confusion between any i-
26 Health term and Plaintiff's alleged trademarks is precluded.

27 56. Upon information and belief, Plaintiff's claims are barred by laches,
28 estoppel, and/or acquiescence. In this regard, Plaintiff never timely complained about

1 Defendant's use of its business name i-Health, Inc. or the website www.i-
2 healthinc.com.

3 57. Defendant reserves all affirmative defenses under Rule 8(c) of the Federal
4 Rules of Civil Procedure, the Lanham Act, and any other defenses at law or in equity,
5 which may now exist or in the future be available based on discovery and further
6 factual investigation in this case.

7 **COUNTERCLAIMS**

8 For its Counterclaims against Plaintiff/Counterclaim Defendant Hi-Health
9 Supermart Corp. ("Plaintiff"), Defendant/Counterclaimant i-Health, Inc. ("Defendant")
10 alleges as follows:

11 **Jurisdiction and Venue**

12 1. These Counterclaims arise under the Trademark Act of 1946, as amended,
13 15 U.S.C. § 1051 *et seq.* (commonly referred to as the Lanham Act). This Court has
14 jurisdiction over the subject matter of the federal counterclaims pursuant to 28 U.S.C.
15 §§ 1331 and 1338, as well as the Lanham Act, 15 U.S.C. § 1051 *et seq.*, including but
16 not limited to 15 U.S.C. § 1121, as amended.

17 2. As Plaintiff has accused Defendant of infringing United States Trademark
18 Registrations bearing numbers 1,197,635 and 1,212,78, an actual case or controversy
19 exists between the parties with respect to the alleged trademark rights under the these
20 marks, the validity and enforceability of these marks, and alleged infringement of the
21 these marks. Accordingly, this Court has jurisdiction under the Declaratory Judgment
22 Act, 28 U.S.C. §§ 2201 through 2202.

23 3. This Court has personal jurisdiction over Plaintiff by virtue of Plaintiff
24 having submitted itself to the jurisdiction of the Court by filing the Complaint. Venue
25 is proper in this judicial district pursuant to 28 U.S.C. § 1391.

26 **Parties**

27 4. Plaintiff is an Arizona corporation with a principal place of business in
28 Scottsdale, Arizona.

1 5. Defendant is a Delaware corporation having principal offices in
2 Cromwell, Connecticut.

3 **Factual Allegations**

4 6. Plaintiff has asserted U.S. Trademark Registration Nos. 1,197,635 and
5 1,212,787 in this proceeding (i.e., the two asserted registrations).

6 7. Upon information and belief, Plaintiff has not filed the requisite
7 specimens for the specifically identified goods and services in the two asserted
8 registrations in order to properly renew the registrations, and, therefore, the
9 registrations should be cancelled pursuant to 15 U.S.C. § 1119.

10 8. Upon information and belief, Plaintiff was not using the two asserted
11 registered trademarks in commerce in February 2012 (for the specifically identified
12 goods and services in the two asserted registrations) when Plaintiff filed its documents
13 at the United States Patent and Trademark Office (“USPTO”) in February 2012, and,
14 therefore, the registrations should be cancelled pursuant to 15 U.S.C. § 1119.

15 9. Upon information and belief, Plaintiff was not using the two asserted
16 registered trademarks in commerce in February 2012 and for at least three years before
17 February 2012 (for the specifically identified goods and services in the two asserted
18 registrations) when Plaintiff filed its documents at the USPTO in February 2012, and,
19 therefore, the registrations should be cancelled pursuant to 15 U.S.C. § 1119.

20 10. Upon information and belief, Plaintiff has not used in commerce the two
21 asserted registered trademarks for the specifically identified goods and services in the
22 two asserted registrations for at least three years prior to the 2012 filing of
23 counterclaims for cancellation of the two asserted registrations (in the U.S. Trademark
24 Trial and Appeal Board Proceeding No. 91207448) and therefore, the registrations
25 should be cancelled pursuant to 15 U.S.C. § 1119.

26 11. Upon information and belief, Plaintiff has fraudulently maintained the
27 two asserted registrations by knowingly filing deficient documents and sworn
28 statements at the USPTO in February 2012 when Plaintiff knew it was not using the

1 registered trademarks, and, therefore, the registrations should be cancelled pursuant to
2 15 U.S.C. § 1119.

3 12. Upon information and belief, Plaintiff abandoned usage of the trademarks
4 in the two asserted registrations for the specifically identified goods and services in the
5 two registrations at least five years prior to the 2012 filing of counterclaims for
6 cancellation of the two registrations (in the U.S. Trademark Trial and Appeal Board
7 Proceeding No. 91207448) and therefore, the registrations should be cancelled pursuant
8 to 15 U.S.C. § 1119.

9 13. Upon information and belief, Plaintiff is knowingly asserting fraudulent
10 trademark registrations against the Defendant.

11 14. Upon information and belief, this is an exceptional case in view of, at
12 least, Plaintiff's known assertion of fraudulent trademark registrations against
13 Defendant.

14 15. Upon information and belief, Defendant has been damaged and is being
15 damaged by Plaintiff's assertions and actions in this case.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Defendant/Counterclaim Plaintiff i-Health, Inc. ("Defendant")
18 respectfully requests that:

- 19 i. Hi-Health Supermart Corp. ("Plaintiff") take nothing from
20 Defendant by way of the Complaint and the Court dismiss the
21 Complaint with prejudice;
22 ii. Judgment on the Complaint be entered in favor of Defendant and
23 against Plaintiff;
24 iii. Cancellation, pursuant to 15 U.S.C. § 1119, of Plaintiff's federal
25 trademark registration Nos. 1,197,635 and 1,212,787;
26 iv. Defendant be awarded its attorney's fees pursuant to 15 U.S.C. §
27 1117 and/or any other federal or state law to which it is entitled to
28 compensation for reasonable attorney's fees;

v. Defendant be awarded all of its costs and expenses incurred in this action; and

vi. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Defendant demands trial by jury on all issues related to its Counterclaims which are triable to a jury.

Dated this 11th day of February 2013.

Respectfully submitted,

WEISS & MOY, P.C

s/ Kenneth M. Motolenich-Salas
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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants of record in this matter.

By: s/ Kenneth Motolenich-Salas